

the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

15 U.S.C. § 2607(e). The plain language of the statutory provision is clear and unambiguous.

Section 8(e) imposes a mandatory statutory duty to inform that is continuing in nature. This duty to inform begins as soon as a person subject to the reporting requirement obtains 8(e)-reportable information; the duty ends when that person informs the Administrator of the information or has actual knowledge that the Administrator has been adequately informed. Id. Any other reading of the statute would be contrary to the plain language of section 8(e) and would defeat the purpose of the reporting requirement.

The continuing nature of TSCA section 8(e)'s mandatory duty to inform may be distilled from a single word in the statutory provision: inform. The word "inform" appears in the main clause of section 8(e): "Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately *inform* the Administrator of such information. . . ." 15 U.S.C. § 2607(e) (emphasis added). This word powerfully and succinctly describes the essential element of the statutory duty: *to inform*. The word "inform" means to impart information or knowledge. Merriam-Webster Dictionary (<http://www.merriam-webster.com/dictionary/inform>). As such, the only logical reading of this statutory provision is that the mandatory duty to inform ends when the person has imparted the information to the Administrator and that that reporting duty continues until the information has been, in fact, imparted.

The only indication by Congress as to a limitation on TSCA section 8(e)'s mandatory duty to inform may be found in the phrase which follows the main clause in the statutory provision: "*unless* such person has actual knowledge that the Administrator has been adequately informed of such information." 15 U.S.C. § 2607(e). This phrase functions to cut off the

statutory duty to inform, only where the person has actual knowledge that the Administrator has been adequately informed of such information. This is the sole limitation that Congress placed on the section 8(e) statutory duty to inform. Congress' inclusion of this limitation demonstrates that Congress knew how to place a limitation on the statutory duty to inform, and decided to include this precise one. Consequently, the section 8(e) duty to inform is subject solely to this exclusive limitation.<sup>25</sup>

Respondent argues that Congress' use of the word "immediately" in TSCA section 8(e) establishes a time frame for compliance thereby making it clear that section 8(e) does not impose a continuing statutory reporting duty. Resp't Memorandum at 9. Respondent's argument is misplaced. First, the only limitation that Congress placed on the statutory duty to inform is where a person has actual knowledge that the Administrator has been adequately informed of the information. Section 8(e) contains no other limitation. A reading of the plain language of the statute evinces no indication that Congress specified a date certain or time frame for compliance. Rather, the term "immediately" functions to establish the beginning of the continuing statutory duty to inform, and reflects the importance Congress gave to timely submission of substantial risk information. If Congress had intended for section 8(e)'s mandatory duty to inform to expire by a certain deadline or within a certain time frame, it would have included such a limitation in the statutory provision. But Congress did not do so.

As a general matter, where Congress has not expressly specified a deadline or an end point for compliance, courts will not impose a deadline. "For reporting statutes . . . so long as the reporting need not occur within a certain time span, a failure to report certain conditions will generally constitute a continuing violation for so long as the failure to report persists."

Interamericas Investments LTD., 111 F.3d at 382 (citing Hanover Shoe, Inc., 392 U.S. at 502

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<sup>25</sup> As alleged in the Complaint and stated above in this Memorandum, Respondent did not inform the Administrator of the Modern Report until November 17, 2008. In addition, Respondent has failed to offer any evidence to support its alleged affirmative defense that it had actual knowledge that the Administrator had been adequately informed of the Modern Report. See Answer at 6-7.



n.15). Conversely, where Congress has specified a deadline or end point for compliance (e.g., annual reporting requirement), courts generally will not find a continuing violation. See In the Matter of Rhone-Poulenc Basic Chemicals Div., 1998 WL 289239, 8 (E.P.A.), Docket No. 5-EPCRA-97-053 (April 27, 1998) (holding that the annual reporting requirement in EPCRA section 313 was not a continuing violation); see generally Lazarus, 7 E.A.D. 318 (EAB 1997).

Moreover, Respondent erroneously relies upon the EAB's decision in Lazarus to draw a false analogy between TSCA section 8(e)'s statutory duty to inform and an annual filing requirement with a recurring deadline.<sup>26</sup> In its Memorandum, Respondent contends, "The statute's [TSCA section 8(e)'s] requirement that information be submitted 'immediately' to EPA is no less certain a time frame than the requirement at issue in Lazarus that a party prepare annual reports by July 1 each year." Resp't Memorandum at 9. Although Respondent is correct that the EAB in Lazarus found that the regulation requiring the filing of a PCB annual document occurs at a specific point in time (i.e., every July 1) and that nothing in the regulation suggests an ongoing obligation to prepare the annual document, Respondent's analogy is flawed. Id. (citing Lazarus). Respondent, in making this analogy, misconstrues the word "immediately" in section 8(e) to establish a compliance deadline or time frame on the statutory duty to inform. Other than stressing the term "immediately," Respondent points to no language in section 8(e) to suggest that Congress authorized this mandatory duty to expire within a certain time frame because there is none. As discussed above, the only limitation that Congress placed on the duty to inform is where a person has actual knowledge that the Administrator has been adequately informed. That limitation operates to cut off the statutory duty to inform the Administrator, rather than establish a compliance deadline or time frame.

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<sup>26</sup> Respondent, in its Memorandum, relies heavily upon a narrow portion of the EAB's Lazarus decision. Resp't Memorandum at 6-9. Respondent's legal argument in support of its Motion noticeably fails to apply the EAB's Harmon test to the facts of this case. See id. Moreover, Respondent relies exclusively upon the EAB's rationale for finding that one of the three violations at issue in Lazarus was not a continuing violation, but ignores the EAB's analysis finding that the remaining two violations were continuing violations. Id.

Finally, Respondent's position that TSCA section 8(e) does not impose a continuing statutory duty conflicts with one of the primary purposes of the section 8(e) reporting requirement to establish an "early warning system" for potential harms. This early warning system is intended to ensure that substantial risk information about the potential chemical hazards is submitted to EPA to enable the Agency to take timely and appropriate protective measures. EPA uses TSCA section 8(e) substantial risk information in a variety of ways, including but not limited to: identifying chemicals for further assessment or testing; utilizing chemical hazard and exposure information in risk assessment and risk management of commercial chemicals; and referring information of interest to other regulatory authorities and stakeholders. Because substantial risk information about potential chemical hazards is often self-generated by industry to better understand the risks associated with the chemical substances an industry or company manufactures and EPA has a limited capacity to monitor whether, when, and by whom substantial risk information is being developed across thousands of companies and chemicals, Congress squarely imposed section 8(e)'s mandatory reporting duty on manufacturers, processors, and distributors of chemical substances and mixtures. Imposing a deadline or time frame for complying with section 8(e)'s reporting requirement where Congress did not impose such a deadline or time frame would frustrate Congress' intent that section 8(e) operate as an "early warning system" by negating the continuing duty to inform the Administrator of substantial risk information.

**2. Other tribunals have determined that TSCA section 8(e) or analogous language imposes a continuing reporting duty and therefore the continuing violation doctrine applies to the statute of limitations.**

Two decisions predating the EAB's Harmon decision are instructive for analyzing whether section 8(e) violations are continuing in nature.<sup>27</sup> In the first case, United States v.

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<sup>27</sup> These decisions pre-date the EAB's application of the doctrine of continuing violations to the general federal five-year statute of limitations at 28 U.S.C. § 2462 in Harmon, Lazarus, Newell, and Mayes, and reflect a similar analysis and outcome as those EAB cases ultimately decided years later. These two cases also pre-date the 3M Co. decision.